Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1960

MARK RICHARD POWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The Petitioner, Mark Richard Powers, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion entered in this cause on April 30, 1980, by the United States Court of Appeals for the Eighth Circuit.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals has not yet been published but was filed April 30, 1980, and appears as Appendix A.

JURISDICTION

On April 30, 1980, the United States Court of Appeals for the Eighth Circuit filed its opinion and judgment (see Appendix A). The Petitioner has not filed any motion for a rehearing of this matter by the Court nor did he request a hearing en banc. Further, he has neither required nor received an extension of time within which to file a Petition for Certiorari. The jurisdiction of this Court is invoked under Title 28 U. S. C., § 1254(1).

QUESTION PRESENTED

In this case, the United States Court of Appeals has decided Federal questions of substance which have not been, but should be, settled by this Court, to wit:

1. Whether the Defendant, in requesting closure of his criminal trial has the burden of proof to demonstrate: (a) a substantial probability of irreparable damage; (b) a substantial probability that alternatives to closure do not exist; and (c) that closure will be effective in protecting against the perceived harm.

2. Whether a Defendant is denied due process of law under the Fifth Amendment, when he is prohibited from a fair opportunity to defend against the government's accusations by being required to proceed in an open public trial, even though the Defendant has waived his right to a public trial under the Sixth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V and VI of the Constitution of the United States are set forth in Appendix B.

STATEMENT OF THE CASE

On January 25, 1979, an Indictment was returned by the Grand Jury in the United States District Court for the Southern District of Iowa charging the Petitioner with violations of Title 18 U. S. C., §§ 371, 474 (1976) for Conspiracy to Counterfeit and Possession of Counterfeit Plates (Appendix B). To these charges, the Petitioner, on January 29, 1979, entered a plea of not guilty.

On April 3, 1979, the Petitioner filed a motion seeking discovery as to his past involvement as an undercover agent and an informer [R. Motion for Discovery]. On June 8, 1979, the District Court ordered discovery [R. Ruling on Motion for Discovery]. Following the Government's reports to the Court on July 10, 1979, and again on July 23, 1979, the Petitioner filed another Mo-

tion for Discovery on July 25, 1979 [R. Motion for Further Discovery]. In requesting the further information, the motion specifically set forth the defenses upon which the Petitioner would be relying. Essentially the allegations as to the defenses were that if the Petitioner was engaged in a conspiracy, it was as an informant for law enforcement; and, when the Petitioner had been in possession of the counterfeit plates, his conduct was consistent with his past record as an informant for on several past occasions the Defendant had been in possession of contraband.

Concomitant with this motion, the Petitioner filed a Waiver of Public Trial and a Motion to Exclude the Public [R. Motion to Exclude Public]. The basis for this motion was that to establish the aforesaid defenses he would be required to divulge his past activities as an informant essentially to show that his actions in the instant case were no different than they had been in the past.

Also it was alleged that, because of the fear for the safety of himself and his family if he were to publicly divulge specific past activities, the Petitioner would be denied his right to present a defense if the trial were to be public. To this motion the Government objected [Plaintiff's Resistance to Motion to Exclude Public].

On August 29, 1979, and again on September 4, 1979, a hearing was held upon the Petitioner's motion before the Honorable Judge William C. Stuart in the United States District Court for the Southern District of Iowa. The hearing was bifurcated. Initially the legal issues upon the requested closure were presented followed by

an in camera hearing, wherein the Petitioner testified and presented evidence in support of his motion for closure [Transcript, In Camera Hearing].

At the time the Government had responded to the Petitioner's request for discovery, in their reports to the Court on July 10, 1979, and July 23, 1979, several instances were set forth where the Petitioner had been an undercover agent and/or informant not only for the Iowa Bureau of Criminal Investigation, but the Federal Bureau of Investigation as well. Additionally, the responses showed that on several occasions the Petitioner had been in the possession of contraband and had been a "co-conspirator" [R. Government's Report to Court on July 10 and July 23, 1979].

The testimony at the time of the in camera hearing reflected that the Petitioner had been an informant on no less than eleven (11) occasions over a period of years. Additionally on two (2) occasions the Federal Government had dismissed charges against defendants rather than reveal the Petitioner's identity as an informant [Tr. In Camera Hearing, pp. 13, 41, 51-52]. Most of the information supplied by the Petitioner resulted in convictions; and, only in one case out of eleven (11) was the Defendant required to testify. Therefore, no one except the particular defendant against whom the Petitioner had testified knew of his activities as an informant nor was it known to what extent the Petitioner had been an informant [Tr. In Camera Hearing, pp. 55-59].

The Petitioner further testified as to the fear he felt for the safety of himself and his family. This fear was based on the statements of the individuals against whom

he had testified as well as their reputations. He testified that there were certain individuals whom he believed were dangerous and with whom he had concern as to their violent propensities [Tr. In Camera Hearing, pp. 9, 15-17, 19, 22, 34-35, 46-47, 49-51, 69-71].

The United States Assistant District Attorney thoroughly cross-examined the Petitioner and in so doing brought out factors which might have reduced the danger to the Petitioner; however, no affirmative evidence was offered by the Government to rebut the Petitioner's evidence nor did the Government demonstrate in any manner that the Petitioner's fears were unreasonable or feigned.

The Petitioner rested and the government presented no evidence. On September 7, 1979, Judge William C. Stuart issued his ruling finding that the Petitioner had failed to sustain his burden of proof. Judge Stuart, in his ruling, held that the Petitioner had to establish the following:

(1) by clear and convincing evidence that there was a clear and present danger of actual harm to the life of the Defendant or a member of his family;

(2) consent to the closure on the part of the prosecution . . . or a compelling reason for not requiring the prosecutor's consent;

(3) by clear and convincing evidence that the closure of the Defendant's criminal trial would effectively prevent the harm alleged and proven to exist; and

(4) by clear and convincing evidence that there are no effective alternatives to the complete closure of the criminal trial. (See Appendix C.)

Thereafter, on September 14, 1979, the Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit [R. Notice of Appeal]. The cause was submitted on December 7, 1979, and on April 30, 1980, the Court of Appeals, in a two to one decision, affirmed the decision of Judge William C. Stuart. It is by reason of the denial of closure that the Petitioner hereby requests the Supreme Court of the United States to issue a Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

I. In this case, the Circuit Court of Appeals has decided a federal question of substance which has not yet been settled by this Court and that is: when a defendant requests the closure of a criminal trial does the standard adopted by the United States District Court of the Southern District of Iowa, the plurality opinion of Gannett Co. v. DePasquale, — U. S. —, 99 S. Ct. 2898, 63 L. Ed. 2d 608 (1979), or the dissent of Justice Blackmun as adopted by the Circuit Court of Appeals for the Eighth Circuit govern.

II. This case presents a serious question as to whether the defendant should be allowed closure over the objection of the prosecution, and thereby be insured of due process, when without closure the defendant will not be able to fully and adequately present a defense and thus will not be able to fairly defend against the government accusations.

As the Circuit Court of Appeals aptly pointed out in the majority opinion, the Supreme Court has not precisely

addressed the question of the extent to which a defendant can compel closure when he claims his right to a fair trial is jeopardized. *United States v. Powers,* infra, Appendix A. However, the standard which was adopted by the Circuit Court of Appeals was that of Justice Blackmun's dissent in *Gannett Publishing Co. v. DePasquale,* — U. S. —, 61 L. Ed. 2d at 660-61. *Powers,* supra, at page 9, Appendix A.

Additionally, the Circuit Court of Appeals held that a defendant requesting closure had the burden to demonstrate a strict and inescapable necessity for closure, in addition to the adoption of the three-prong test espoused by Justice Blackmun. However, the simple answer of the adoption of such a standard belies the two-fold question which has not yet been answered and that is: first, what standard is to be applied; and secondly, who has the burden—not only the burden of proof, but the burden of going forward.

As to the latter question concerning burden of proof, the Petitioner would submit that though the person who requests closure has the burden of going forward with the evidence to establish whatever standard is adopted, it is the Government who has the burden of proof to prove that closure is not necessary.

Essentially, it is the Petitioner's contention that when he, or any defendant, alleges a fear and a danger to his own welfare and safety and thus requests closure and thereafter introduces uncontroverted evidence to support such, the Government should have the burden of proof. As this Court stated in *In Re Winship,* 399 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), in quoting from *Speiser v. Randall,* 357 U. S. at 525-526, 78 S. Ct. at 1742:

> "There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder. . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder. . . ."

In the instant case the Petitioner is faced with two interests of transcending value. One is the personal safety and welfare of the Petitioner as well as that of his family. Secondly, and more importantly, at least in the context of a fair trial, is that because of his fear he will not be able to present his defense to the factfinder, which is bottomed on his past actions as an informant construed in light of his present actions and thus is directed solely at an essential element of the offense charged: namely, intent.

Therefore, because of these two transcending values the burden of proof should lie on the party resisting the requested remedy—that is, the Government, regardless of the standard of proof adopted.

In this case, the question is one of the waiver of a fundamental right—right to a public trial. Since the right to a public trial is that of a defendant, *Gannett Publishing Co., supra,* and the public has no right therein, the Petitioner should be able to waive such. And, though the waiver of this right does not compel the opposite of this right, *Singer v. U.S.,* 380 U.S. 24, 85 S.Ct. 783

(1965), i.e., mandatory closure, closure should have been allowed.

The Petitioner, upon waiver, should have the burden to go forward with the evidence, i.e., to establish that there is a necessity for closure. However, once this is shown, then the burden of proof should lie with the Government.

If this is not the case, then as here, where the Petitioner's waiver was resisted and as the District Court judge recognized, that the Government would " . . . never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution charges against the Defendant . . . " the mere resistance by the Government defeats the Petitioner's defense [R. Ruling on Defendant's Motion, Court of Appeals]. The Government by merely resisting, without evidence and without any burden, denies a Defendant his day in court and "chills" his rights to due process. Thus, if the Petitioner has not only the burden of going forward, but the burden of establishing the three-prong test propounded by Justice Blackmun's dissent as adopted by the Circuit Court of Appeals, the Petitioner could never have closure. Therefore, the Petitioner would submit that the burden of proof should be on the Government.

Now, as to the standard to be applied. The Petitioner would submit that the three-prong test adopted by the Circuit Court of Appeals as well as the test promulgated by District Judge William C. Stuart is an impossible burden and that the test should be one of balancing the transcending values and interests affected by the requested closure under the standards espoused by

the Petitioner in the District Court and the Circuit Court of Appeals.

The standard by which closure should be considered must be one which keeps in mind the Petitioner's right to a fair trial. Included within such right is the presentation of the evidence before a jury with the right to effectively cross-examine the Government's witnesses; to present his own witnesses, if any; and to testify in his own behalf, if he desires. It is the Petitioner's freedom, liberty and innocence or guilt which is to be determined and with which we must be concerned. It must be remembered that the ". . . court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial," *Estes v. Texas,* 381 U. S. 532, 85 S. Ct. 1628 (1965). As stated by former Chief Justice Warren in his concurring opinion, *Estes,* ibid., 95 S. Ct. at 1641:

> ". . . The criminal trial under our constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."

Initially, the Petitioner would recognize that an open trial is a right of constitutional magnitude. As stated by the majority opinion in *Estes v. Texas,* op cit.:

> "We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the accused. The purpose of he requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned."

However, though this be a constitutional right, it is the right of the accused and his alone, *Geise v. U. S.,* 265 F. 2d

659 (9th Cir. 1959), *Gannett Publishing Co. v. DePasquale,* op. cit. And though this right is not a limitless imperative, *Aaron v. Capps,* 507 F. 2d 685 (5th Cir. 1975), it is, in fact, one of the accused's rights. Also, since none of the accused's rights in a criminal trial are to be formalistically applied, and particularly that of the Sixth Amendment, it is necessary to look at all of the facts and the totality of the case, for each right is dependent upon those facts and circumstances of the individual case. Again quoting former Chief Justice Warren in *Estes,* supra:

> ". . . Neither the Sixth or Fourteenth Amendment is to be read formalistically, for the clear intent of the Amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though 'every form [be] preserved, the forms may amount to no more than empty shell' when considered in the context or setting in which they were actually supplied."

As such, what essentially results, when reduced to the most common denominator, is that there must be a balancing of interests weighed by the Court in determining constitutional rights, *Levine v. U. S.,* 362 U. S. 610, 80 S. Ct. 1038 (1960); *U. S. ex rel. Latimore v. Sielaff,* 561 F. 2d 691 (7th Cir. 1977).

The balance which must be struck is that of societal interests in maintaining a free and open access to the Courts; the societal interests in determining that Defendants receive a fair trial; and societal interests in being able to determine and observe that trial participants perform their duties. These societal interests must be balanced against the Defendant's right to a fair trial—that

is, an open and complete disclosure of the facts and evidence, so that the Defendant may be judged by all of the facts and not just those selected by either the Government or the defense. It is this balance which we submit must be arrived at and not the mere application of the formalistic readings of the Sixth and Fifth Amendments.

There is ample precedent in the following cases which, on a balancing factor, has allowed the closure of portions of a trial, particularly in favor of the Government's right to present its case. These cases are: *U. S. ex rel. Lloyd v. Vincent,* (2nd Cir. 1975), 520 F. 2d 1272 (closure to protect the identity of two undercover narcotic officers); *U. S. ex rel. Smallwood v. Lavalle,* (EDNY 1974), 377 F. Supp. 1148 (exclusion of spectators on motion by the Government when witness testified because of fear of reprisal against the witness); *U. S. ex rel. Bruno v. Herold,* 408 F. 2d 125 (2nd Cir. 1969) (closing of courtroom because of the fear of the witness); *U. S. ex rel. Laws v. Yeager,* 448 F. 2d 74 (3rd Cir. 1971) (removal of witness' mother felt to inhibit witness' freer testimony); *U. S. v. Eisner,* 533 F. 2d 987 (6th Cir. 1976) (witness embarrassed and courtroom cleared); *U. S. ex rel. Latimore v. Sielaff,* supra; and *Harris v. Stephens,* 361 F. 2d 888 (8th Cir. 1966) (clearing of courtroom for complainant's testimony in a rape case). Additionally, where a witness, because of fear of reprisal and harm, has refused to divulge his name and address, though it denies the Defendant effective cross-examination, this has been found to be permissible; *U. S. v. Palermo,* 410 F. 2d 468 (7th Cir. 1967); *U. S. v. Bell,* 464 F. 2d 667 (2nd Cir. 1972) (removal of the Defendant from the courtroom while the witness is testifying, about the anti-hijacking profiles). To the same effect, see

U. S. v. Lopez, 328 F. Supp. 1077 (EDNY 1971); *U. S. v. Slocum,* 464 F. 2d 1180 (3rd Cir. 1972); *U. S. v. Ruiz-Estrella,* 481 F. 2d 723 (2nd Cir. 1973). The Petitioner would, for further reference, also refer to the following annotations: 48 A. L. R. 2d 1436, *Exclusion of Public During Criminal Trial;* 49 A. L. R. 3d 1007, *Right of Accused to have Press or other Media Representative Excluded from Criminal Trial.*

As such, each of the foregoing cases from the various circuits (Second, Third, Sixth, Seventh and Eighth) recognize that the right to an open, public trial is not absolute. And, that even over the Defendant's objections, when a balancing concept is used, portions of the trial may be closed. Because of this, when a Defendant's right to a fair trial may be in jeopardy, the Court should look at all of the attendant facts and circumstances in determining whether access should be limited. Even the National Association of Broadcasters recognized such in *Estes v. Texas, supra.* Therein, the majority opinion stated at p. 1631, 85 S. Ct.:

> "While the State and Federal Courts have differed over what spectators may be excluded from a criminal trial . . . , the amici curiae brief of the National Association of Broadcasters and the Radio Television News Directors Association says, as indeed it must, that 'Neither of these two Amendments (First and Sixth) speaks of an unlimited right of access to the courtroom on the part of the broadcasting media * * *' AT 7. Moreover, they recognize that the 'primary concern of all must be the proper administration of justice'; that 'the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media'; and that 'the due process requirements in both

> the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial. * * *' "

Therefore, in looking at the attendant circumstances and in using a balancing concept the Petitioner has contended that in this case closure should have been allowed since not only would it be inimical to his safety, *U.S. v. Lavalle,* op. cit., but because of his inability to present a defense.

The Petitioner alleged in his motion for discovery that he was at the time of this offense acting as an informant and had been an informant in the past [R. Motion for Discovery; Motion for Further Discovery]. By reason of such an allegation or defense one of the essential elements which the Government will be required to prove upon trial is that the Petitioner had an intent and an intent of mens rea—the intent to voluntarily and knowingly participate in this offense and not as an informant. In meeting this issue, it is the Petitioner's contention that he had no such intent either as to the possession of the counterfeit plates or as to being a member of the conspiracy. In essence, he was acting in this case as he had in the past.

As found by the District Court, the Petitioner on six (6) past occasions participated in a conspiracy as an informant for the Federal Bureau of Investigation and in so doing, possessed contraband four (4) times when law enforcement personnel were aware of his possession of contraband. Also, it was found that on two (2) occasions when acting as an informant he had possession of contraband for a time when law enforcement personnel were not aware of his possession of it [R. Ruling and

Order, p. 4, filed September 7, 1979, Appendix C]. It is these findings and these specific instances which the Defendant would explain and introduce to the jury to show that in the instant offense the Petitioner was acting only as he had in the past. However, to establish this, it will be and is necessary to show how and to whom he acted in the past. Facts, interrogation, dates and places will have to be divulged. This cannot be done in the glaring light of publicity.

It is one thing to be publicly known as an informer, but it is completely another thing to have it publicly known against whom the Petitioner informed. The Petitioner has a right to testify as to his past to establish his defense or rebut the intent of the charge. However, if he cannot do so, because of fear of disclosure; if he cannot do so because of fear of consequences of disclosure; if he cannot cross-examine witnesses as to past involvement, then he has been afforded no trial, other than to sit and have the Government freely present their evidence without the opportunity to rebut, explain or deny. This would be as an effective shackling of the Petitioner as if he would be physically bound and gagged during trial.

Yet, if we are to follow the ruling of the District Court and the affirmance of the Circuit Court of Appeals, then the Petitioner has one hand tied behind his back. Full disclosure in order to properly defend will place him in jeopardy. Partial disclosure may not be sufficient. Thus, in effect, what the District Court has done was to recognize the Petitioner's defense, but shackle him in his presentation.

Though it is clear from a review of the authorities that the "public trial" provision of the Sixth Amendment also allows the public a right, that right must be balanced with the Defendant's right to a fair trial, which we submit is of paramount importance.

Therefore, if the Court can close a proceeding for fear of reprisal against a witness; because of disruption by reason of lurid details of an act; for protection of trade secrets; to prevent youthful witnesses from being present as well as to protect pre-trial publicity, then if the Defendant's health and safety are in or could be in danger, there is ample authority for closure.

In the in camera hearing there was definite evidence of fear and violence on behalf of certain persons against whom the Petitioner had informed as well as their friends and associates. Because of this fear and the probability of danger and by reason of the inability to present an effective defense, these two transcending values should have, in the balance, outweighed the norm of open trial. The Petitioner showed a clear and present danger; and, further proved by clear and convincing evidence the necessity for such closure—the inability to present a defense. This was buttressed by the very fact that the Government had on two (2) past occasions dismissed cases rather than divulge the Petitioner's identity. Obviously the danger existed. Yet the standard adopted did not and will not allow a closure under any circumstances.

Therefore, by reason of the adoption by the Circuit Court of Appeals of such a standard which places upon the party requesting closure an impossible burden, when coupled with the ample precedent and diversity of opinion as to when and under what circumstances closure may

occur, this case presents a serious problem of fundamental fairness in a criminal case where the Petitioner's due process will surely be violated if he is forced to elect as to the open trial or no defense.

Such an election would not be necessary if the Court would hold that the Fifth Amendment right of due process is effected by the norm of public trial and place a standard of balancing factors against the Sixth Amendment with the Government having the burden of proof upon this issue.

Therefore, the Petitioner respectfully requests, knowing this Court's concern for the Fifth and Sixth Amendment rights to due process and public trial, to issue a Writ of Certiorari and determine the substantial questions presented by the Petitioner.

CONCLUSION

For the reasons expressed herein, the Petitioner respectfully requests that a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1791

UNITED STATES OF AMERICA,
Appellee,

vs.

MARK RICHARD POWERS,
Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Submitted: December 7, 1979
Filed: April 30, 1980

Before GIBSON, Chief Judge,* LAY and McMILLIAN, Circuit Judges.

GIBSON, Senior Judge*

Mark Powers appeals the pretrial order of the District Court[1] denying Powers's motion to exclude the public during his criminal trial. We affirm.

On January 25, 1979, a federal grand jury returned a two-count indictment against Powers charging violations

*The Honorable Floyd R. Gibson was chief judge of the Eighth Circuit at the time this case was submitted, but took senior status on December 31, 1979, before the opinion was filed.

[1]The Honorable William C. Stuart, Chief Judge, United States District Court, Southern District of Iowa.

of 18 U. S. C. §§ 371, 474 (1976) for conspiracy to counterfeit and possession of counterfeit plates. Powers entered a plea of not guilty on January 29, 1979. On April 3, 1979, he filed a motion seeking further discovery concerning his past involvement as an undercover agent or informant for federal and state law enforcement officials for the purpose of establishing a defense. On June 8, 1979, the District Court ordered further discovery.

On July 25, 1979, Powers filed a motion to exclude the public during his trial, alleging that the right to a public trial is the personal right of the defendant and may be waived by him. The Government resisted the motion. The District Court held hearings on the motion on August 29, 1979, and September 4, 1979, at which time *in camera* testimony was given by Powers concerning his informant status. On September 7, 1979, the court entered an order denying Powers's motion but did find that Powers had served as an informant on a number of occasions for both the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation. Powers appeals this interlocutory order under 28 U. S. C. § 1291 (1976).[2]

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[2]Section 1291 grants the courts of appeals jurisdiction to review "all final decisions of the district courts * * *." Adherence to the rule of finality should be "particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Abney v. United States*, 431 U. S. 651, 657 (1977). In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), the Supreme Court limited appellate review of trial court orders to those "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

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We have grave doubts concerning the appealability of interlocutory orders regarding closure of criminal trials to the public. *See Gannett Co. v. DePasquale*, — U. S. —, —, 61 L. Ed. 2d 608, 633 (1979) (Powell, J., concurring and stating "it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings."). When the accused in a criminal case seeks immediate appellate review of an interlocutory order regarding trial closure, the order of the trial court will ordinarily not be separable from the issues to be resolved in the criminal trial itself. The order may therefore affect the decision to be made on the merits in the trial court. *Abney v. United States, supra,* 431 U. S. at 660; *Cohen, supra,* 337 U. S. at 546; *see United States v. Barket,* 530 F. 2d 181, 185 (8th Cir. 1975), *cert. denied,* 429 U. S. 917 (1976); *cf. United States v. Fuimara,* 605 F. 2d 116, 117-19 (3d Cir. 1979) (public closure at post-trial sentencing hearing not appealable under *Cohen* since defendant has no constitutional right to compel a secret trial). *But cf. United States v. Schiavo,* 504 F. 2d 1, 4-5 (3d Cir.), *cert. denied,* 419 U. S. 1096 (1974) (order enjoining news media, a non-party, from publishing information during trial appealable within collateral order doctrine); *United States v. Cianfrani,* 573 F. 2d 835, 845 (3d Cir. 1978) (order closing pretrial hearing appealable by news media, intervenors, within collateral order doctrine).

However, because of the fallout from the *Gannett* case and the proliferation of cases coming on line dealing with the issue of closure of open and public proceedings and since under the particular facts of this case we find that the trial court's non-closure order would not affect the accused's right to a fair trial, we have assumed jurisdiction in order to discuss the issue of closure in criminal trials. *See Gillespie v. U. S. Steel Corp.,* 379 U. S. 148, 153 (1964).

The dissent suggests that "interlocutory review of a closure decision should be available only in extraordinary cases by writ of mandamus." *Post* at 19. Mandamus is an extraordinary writ of limited dimensions and we feel its scope should not be broadened to encompass this factual context. "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so' "; and, "only ex-

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On appeal, Powers contends the District Court erred in requiring him to bear the burden of proof regarding the necessity of closure, and also in not granting his motion for closure.

In the District Court, Powers argued that his entire criminal trial should be closed to the public so that he could adequately present his defense to the counterfeiting charges; otherwise he would be denied his right to a fair trial under the sixth and fifth amendments. The basis of Powers's motion was that if he had been engaged in a conspiracy or in possession of counterfeit plates, it was as an informant for law enforcement officials, and therefore he lacked the requisite criminal intent. In order to establish a defense based upon lack of intent, Powers contends that he would be required to divulge his past activities as an informant in order to show that his activities in this case were no different from his actions during his previous informant activities, where in some instances he had possessed contraband unbeknownst to the law enforcement agency. Powers alleges that a public

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ceptional circumstances amounting to a judicial 'usurpation of power' will justify the invoication of this extraordinary remedy. *De Beers Consol. Mines, Ltd. v. United States,* 325 U. S. 212, 217 (1945)." *Will v. United States,* 389 U. S. 90, 95 (1967). Here, obviously the District Court did not exceed its jurisdiction, nor in any way usurp power. *Kerr v. United States District Court,* 426 U. S. 394, 402-03 (1976). Furthermore, mandamus is particularly inappropriate when a criminal prosecution is involved, since it results in piecemeal appeals and delayed justice. The Supreme "Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." *Will, supra* at 98. The writ of mandamus is an inappropriate vehicle to review trial court decisions regarding closure of criminal trials.

trial would deny his right to present a defense because fear for his welfare and safety, as well as that of his family, would preclude divulging his past activities in open court.

The District Court found that an order of closure would not be proper unless Powers established the following:

> (1) By clear and convincing evidence that there was a clear and present danger of actual harm to the life of the defendant or a member of his family;
>
> (2) consent to the closure on the part of the prosecution, * * * or a compelling reason for not requiring the prosecution's consent;
>
> (3) by clear and convincing evidence that the closure of defendant's criminal trial would effectively prevent the harm alleged and proven to exist; and
>
> (4) by clear and convincing evidence that there are no effective alternatives to the complete closure of the criminal trial.

United States v. Powers, 477 F. Supp. 497, 499 (S. D. Iowa 1979).

The District Court concluded that Powers had failed to prove by clear and convincing evidence that an open court presentation of his defense would result in a clear and present danger of actual harm to the life of the defendant or a member of his family. In addition, the court suggested an alternative to closure whereby Powers and the Government would stipulate to Powers's informant status.

I.

Powers does not now contend that he has an absolute sixth amendment right to compel closure, though his motion for closure claimed that the right to public trial "is the right of the defendant and may be waived." The Supreme Court, in *Gannett Co. v. DePasquale,* — U. S. —, —, 61 L. Ed. 2d 608, 623 & n. 11 (1979), clearly states that no absolute right to compel a private trial exists, citing *Singer v. United States,* 380 U. S. 24, 35 (1965).

Forgoing any claim of absolute right to closure, Powers limits his claim to a sixth amendment right to waive his right to a public trial to those situations in which the right to a fair trial is denied. Essentially, Powers argues that his sixth amendment right to compel closure is coextensive with his fifth amendment due process right to a fair trial. The Court's plurality decision in *Gannett* apparently does not preclude a right to compel closure whenever a defendant would otherwise be denied a fair trial, if *Gannett's* pre-trial ruling can be applied to the plenary criminal trial. *Gannett, supra,* — U. S. at —, 61 L. Ed. 2d at 623 n. 11; *id.* at —, at 659 & n. 16 (Blackmun, J., dissenting). *See also id.* at —, at 634 (Powell, J., concurring). At issue in this appeal is the narrow question of whether Powers would be denied his due process right to a fair trial, and therefore whether the District Court erred in not allowing him to waive his sixth amendment right to a public trial and compel closure.[3]

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[3]In this case we express no opinion on the issue of whether members of the press or public have any constitutional right

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II.

The Court's majority opinion in *Gannett* did not precisely address the question of the extent to which a defendant can compel closure when he claims his right to a fair trial is in jeopardy. In a footnote, Justice Stewart quoted *Singer v. United States*, 380 U. S. 24, 35 (1965),[4] for the proposition that "although a defendant can *under some circumstances*, waive his constitutional right to a

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to access to criminal trials on the basis of the first and fourteenth amendments, *see Gannett, supra*, — U. S. at —, 61 L. Ed. 2d at 629, or on the closure standards to be applied when both the Government and the defendant agree on closure. *Compare Gannett, supra*, — U. S. at —, 61 L. Ed. 2d at 633-34 & n. 2 (Powell, J., concurring), *with id* at —, at 636-38 & n. 2 (Rehnquist, J., concurring). Nor do we attempt to interpret the extent to which the *Gannett* majority opinion applies to situations beyond the closure of pretrial hearings. *See id.* — U. S. at —, 61 L. Ed. 2d at 630-32 (Burger, C. J., concurring); *id* at —, at 632 n. 1 (Powell, J., concurring). The narrow issue in *Gannett* "is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendant's right to a fair trial." — U. S. at —, 61 L. Ed. 2d at 625 (footnote omitted). *See generally, The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 62-66 (1979).

[4]The Supreme Court, in *Singer v. United States*, 380 U. S. 24 (1965), held that a defendant cannot waive a jury trial without the consent of the prosecutor and the judge because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases. *See Gannett, supra*, — U. S. at —, 61 L. Ed. 2d at 624. The Court, however, left open the question of "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are *so compelling* that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Singer, supra*, 380 U. S. at 37 (emphasis added). In order to waive a jury trial, the defendant must therefore demonstrate, at a minimum, "compelling" reasons for being tried by a judge.

public trial, he has no absolute right to compel a private trial." *Gannett, supra,* — U. S. at —, 61 L. Ed. 2d at 623 n. 11 (emphasis added).

Justice Powell, however, in his concurring opinion in *Gannett,* suggested a standard to be applied by trial courts in response to requests for closure by the defendant:

> The question for the trial court, therefore, in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant *is likely to be jeopardized by publicity,* if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury.
>
> * * * [W]here a defendant requests the trial court to exclude the public, it should consider whether there are alternative means reasonably available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in prompt access to information concerning the administration of justice.

— U. S. at —, 61 L. Ed. 2d at 634 (emphasis added).[5] In contrast, as pointed out by Justice Powell, — U. S. at —, 61 L. Ed. 2d at 634, the dissenting opinion of Justice Blackmun, joined by Justices Brennan, White, and Marshall, would impose a severe burden upon defendants seeking closure. "It comports with the Sixth Amendment to require an accused who seeks closure *to establish that it is strictly and inescapably necessary* in order to protect the

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[5]While Justice Powell is referring here to the specific situation of publicity resulting in prejudicial effects upon a jury, his standard of "is likely to be jeopardized by publicity" apparently also applies to those situations necessary "to preserve the confidentiality of sensitive information and the identity of informants." — U. S. at —, 61 L. Ed. 2d at 633.

fair trial guarantee." — U. S. at —, 61 L. Ed. 2d at 660 (emphasis added).

Finally, Justice Rehnquist, in his concurring opinion, also objects to Justice Powell's standards when the participants in a criminal litigation agree for any reason that the trial shall be closed, — U. S. at —, 61 L. Ed. 2d at 637-38 & n. 2, a situation not presented here.[6]

The criteria for closure adopted in the District Court are substantially similar to those outlined in Justice Blackmun's dissenting opinion. Under the "strictly and inescapably necessary" standard, Justice Blackmun would require a three-prong test:

> The accused who seeks closure should establish the following:
>
> First, he should provide an adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair trial right will result from conducting the proceedings in public.
>
> • • •
>
> Second, the accused should show a substantial probability that alternatives to closure will not protect adequately his right to a fair trial.
>
> • • •
>
> Third, the accused should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm.

— U. S. at —, 61 L. Ed. 2d at 660-61.

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[6]See note 3, *supra*. Justice Powell's standard, however, apparently extends to the case involved herein, at least after the trial judge has granted closure and the prosecutor opposes closure. *See* — U. S. at —, 61 L. Ed. 2d at 635.

The main difference between Justice Blackmun's test and that required by the District Court is that the latter requires "clear and convincing" evidence in order to compel closure, while Justice Blackmun would require only a showing of "substantial probability." In addition, the District Court would require "consent to closure on the part of the prosecution" or "a compelling reason for not requiring the prosecution's consent." Justice Blackmun would apply his test regardless of the consent or nonconsent of the prosecutor. — U. S. at —, 61 L. Ed. 2d at 663.

We believe that Justice Blackmun's three-prong test correctly states the standard to be applied in the limited case where the defendant seeks closure without the consent of the prosecutor. Nothing in the majority opinion in *Gannett* suggests otherwise.[7] If anything, Justice Stewart's majority opinion may imply a greater burden on the defendant to compel closure when there is no consent on the part of the prosecutor. *See* — U. S. at —, 61 L. Ed. 2d at 623 & n. 11.

The practice in Western civilization, and the common-law rule, has been to require public trials. *Gannett,* — U. S. at —, —, —, 61 L. Ed. 2d at 624, 630, 643. There is a strong societal interest in public trials. "Openness in court proceedings may improve the quality of testimony,

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[7]The Court did suggest that a trial court "may surely take protective measures even when they are not strictly and inescapably necessary" in order to minimize the effects of pretrial publicity. — U. S. at —, 61 L. Ed. 2d at 620. Protective measures are proper, and are provided for in the second prong of this test, when the defendant seeking closure is unable to meet the "strictly and inescapably necessary" standard in order to compel complete closure.

indúce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. *Estes v. Texas* [381 U. S. 532,] at 583 (Warren, C. J., concurring) [1965]." *Gannett,* — U. S. at —, 61 L. Ed. 2d at 623. The benefits of an open, public trial are substantial. Only in the rare case will closure to the press be necessary in order to protect a defendant's right to a fair trial. *Id.* at 636 n. 1 (Rehnquist, J., concurring); *Nebraska Press Association v. Stuart,* 427 U. S. 539, 554 (1976); e. g., *Sheppard v. Maxwell,* 384 U. S. 333 (1966); *Estes v. Texas,* 381 U. S. 532 (1965). Even fewer are those cases where the courts will need to go further and exclude the public for limited periods of time. *United States v. Cianfrani,* 573 F. 2d 835, 854 (3d Cir. 1978); *e. g., United States v. Bell,* 464 F. 2d 667, 670-72 (2d Cir.), *cert. denied,* 409 U. S. 991 (1972). The norm and presumption of the sixth amendment is that a trial should be a public proceeding. *Gannett,* — U. S. at —, 61 L. Ed. 2d at 625. Only in the most exceptional circumstances should closure even be considered, and in fewer instances compelled. A criminal defendant is guaranteed a public trial, but there is no constitutional guarantee of a closed trial at the defendant's request. It is certainly worth consideration that in the entire history of our country, no one prior to the *Gannett* decision has advanced the concept of secret trials as applied to a plenary criminal proceeding. As stated by Justice Blackmun in his dissent in *Gannett,* — U. S. at —, 61 L. Ed. 2d at 643:

> The importance we as a Nation attach to the public trial is reflected both in its deep roots in the Eng-

> lish common law and in its seemingly universal recognition in this country since the earliest times. When *In re Oliver* was decided in 1948, the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 333 U. S., at 266 (footnote omitted), with the exception of cases in courts martial and the semiprivate conduct of juvenile court proceedings. *Id.*, at 266 n. 12. Nor could it uncover any record "of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641." *Ibid.*

In order for the defendant to compel closure in a trial wherein the prosecutor does not consent, we hold that the defendant must carry "his burden to demonstrate a strict and inescapable necessity for closure." *Id.* at 661, (Blackmun, J., dissenting); *see United States v. Cianfrani, supra,* 573 F. 2d at 854. We do not decide the correct sixth amendment standard, if any,[8] or the first amendment standard[9] to be applied if the prosecutor consents to closure.

IV.

Powers argued in the District Court for the adoption of a "clear and convincing" evidence standard rather than one based on evidence sufficient to support a finding that there is a "substantial probability" that irreparable damage to his fair trial right will result from a public trial. Since Powers set forth the former standard, he does not appeal its application. Even though the District Court's standard may have been greater than re-

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[8]See note 3, *supra.*

[9]See note 6 and text, *supra.*

quired, Powers was not prejudiced. Powers did not meet the "substantial probability" standard, either. The District Court found that the evidence produced by Powers "at most demonstrates a fear of harm based on the allegedly violent nature of some of the persons involved." Furthermore, Powers "failed to prove that closure would effectively prevent the alleged harm." In addition, the court found that "there is an alternative that * * * will enable the defendant to present his defense without closing the trial to the public." The court suggested that the Government and Powers agree to a stipulation concerning his informant activities.[10] Powers failed all three prongs of the closure test. The District Court's denial of Power's motion to compel closure did not deny him his due process right to a fair trial.

Finally, Powers argues that the District Court erred in placing the burden of proof to compel closure upon him, instead of the Government. Powers contends that he should be made only to bear the burden of going forward with demonstrating a danger of harm to himself or his family. After he has met this burden of going

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[10]*United States v. Powers*, 477 F. Supp. at 499. Extrinsic evidence of specific instances of the conduct of a witness generally may not be introduced for the purpose of attacking or supporting the witness's credibility, see FED. R. EVID. 608(b); *United States v. Poulack*, 556 F. 2d 83, 89 (1st Cir.), *cert. denied*, 434 U. S. 986 (1977); *United States v. Scholle*, 553 F. 2d 1109, 1122-23 (8th Cir.), *cert. denied*, 434 U. S. 940 (1977), though testimony by the accused of specific instances of conduct is admissible when his character or a trait of his character is an essential element of his defense. *See* FED. R. EVID. 405(b); *United States v. Giese*, 597 F. 2d 1170, 1190 (9th Cir.), *cert. denied*, — U. S. —, 62 L. Ed. 2d 405 (1979). Here Powers has already given his testimony *in camera* on the informant issue.

forward, the Government should be required to demonstrate that closure is not necessary. We disagree.

The common-law tradition and our history from its inception certainly compel the assumption that the sixth amendment presumes open trials as the norm. *Gannett*, — U. S. at —, 61 L. Ed. 2d at 625. The defendant therefore has the burden of proof of overcoming this presumption and strong tradition for open proceedings. The defendant argues that since the Government must prove every essential element of the crime in a criminal trial, it must also bear the burden on closure. The closure of criminal proceedings *vel non*, however, is not an essential element of the crime charged. The burden, and indeed a heavy burden, rests on a defendant seeking a private or secret trial. The defendant must demonstrate the necessity of closure based upon all three prongs of the test. Not only must the defendant demonstrate a substantial probability of irreparable damage to his fair trial right, he must also show a substantial probability that alternatives to closure do not exist and that closure will be effective in protecting against the perceived harm. A mere demonstration of potential harm to the defendant is insufficient to shift the burden for opposing closure to the Government. Only after the defendant has met all three prongs of the closure test should the prosecutor be required to demonstrate that less than complete closure is necessary. *See id.* at —, at 662 (Blackmun, J., dissenting); *United States v. Cianfrani, supra*, 573 F. 2d at 854. Here Powers has not even met his burden of demonstrating a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public. Closure would be improper under these circumstances.

Affirmed.

McMILLIAN, Circuit Judge, dissenting.

I dissent. In my view, because the refusal of the court below to close the trial is not a final decision, we lack appellate jurisdiction over the case under 28 U. S. C. § 1291. However, the extraordinary nature of appellant's claim, which involves both an allegedly life and death situation for him and a dramatically unsettled area of law, makes this one of those rare instances where we should treat the appeal as a petition for writ of mandamus. For the following reasons, I would grant the petition for writ of mandamus and order the trial court to close to the public the testimony about appellant's past activities as a police informant.

I. Appellate Jurisdiction

Our jurisdiction to review the district court's decision depends on 28 U. S. C. § 1291, which provides for review of "final decisions." Appellate jurisdiction is not thereby limited only to review of final *judgments*. "While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack v. Boyle,* 342 U. S. 1, 12 (1951) (opinion of Jackson, J.). Where a "collateral order" disposes of some right not bound up with the final judgment in the case, the order may be a reviewable "final decision" under § 1291. *See generally Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949). Examples of such final decisions in criminal cases include: denial of bail, *Stack v. Boyle, supra,* 342 U. S. 1; denial of a pretrial motion to dismiss on double jeopardy grounds, *Abney v. United States,* 431 U. S. 651

(1977); and denial of a motion to dismiss an indictment because the allegedly criminal conduct was immunized by the Speech and Debate Clause, *Helstoski v. Meanor,* 442 U. S. 500 (1979). The Supreme Court has, however, emphasized that appeals prior to final judgment are strongly disfavored in criminal cases where swift and economical dispensation of justice is especially critical. "The rule of finality has particular force in criminal prosecution because 'encouragement of delay is fatal to the vindication of the criminal law.' " *United States v. MacDonald,* 435 U. S. 850, 853-54 (1978), *citing Cobbledick v. United States,* 309 U. S. 323, 325 (1940). *See also Abney v. United States, supra,* 431 U. S. at 656; *DiBella v. United States,* 369 U. S. 121 (1962); *Parr v. United States,* 351 U. S. 513 (1956); *Cogen v. United States,* 278 U. S. 221 (1929).

The requirements for an appealable collateral order have been set forth by this court:

> (1) [T]he order must be a final determination of a claim of right "separable from, and collateral to," rights asserted in the action;
>
> (2) it must be "too important to be denied review," in the sense that it "presents a serious and unsettled question"; and
>
> (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the * * * order and rights conferred * * * will have been lost, probably irreparably."

United States v. Barket, 530 F. 2d 181, 185 (8th Cir. 1975), *cert. denied,* 429 U. S. 917 (1976), *citing* 9 J. MOORE, MOORE'S FEDERAL PRACTICE § 110.10 (2d ed. 1970).

First, the right claimed by appellant is inextricably bound up with the trial of his case. The essential ques-

tion—whether appellant will receive a fair trial—involves disposition on the merits. Here, appellant claims essentially that, because of the dangers to himself and his family, he cannot effectively present in open court a defense based on his claim that he was an informant and therefore did not act with the necessary criminal intent. In general, such due process issues, like speedy trial issues, will not be finally resolved until after the trial. "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative." *United States v. MacDonald, supra,* 435 U. S. at 858.

Similarly, appellant's claim in the present case is that he will be denied a fair trial. The language and holding of *MacDonald* therefore forecloses appellate jurisdiction. Appealable collateral orders in criminal cases have involved only the denial of rights that do not depend on how the trial itself is conducted. *See Stack v. Boyle, supra,* 342 U. S. 1 (denial of bail held appealable). By contrast, this appeal hinges on the conduct of the trial. It is distinguishable from appeals of failure to dismiss an indictment that runs afoul of the speech and debate clause or double jeopardy clause, wherein a defendant "is contesting *the very authority of the Government to hale him into court to face trial on the charges against him.*" *Helstoski v. Meanor, supra,* 442 U. S. at 507 (emphasis in original), *citing Abney v. United States, supra,* 431 U. S. at 659. In the present case, appellant claims the refusal to close his trial "has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed." *United States v. MacDonald, supra,* 435 U. S. at 860. Thus, the third requirement of a collateral order is not met.

The majority opinion recognizes that in general this court lacks appellate jurisdiction until entry of the final judgment (*i. e.*, a conviction and sentence) over a decision below not to close proceedings. *See* slip op. at 2-3 n. 2. Nonetheless, the majority assumes jurisdiction "because of the fallout from the *Gannett* case and the proliferation of cases coming on line dealing with the issue of closure of open and public proceedings. . . ." *Id.* In short, the majority takes jurisdiction of this case because of its "extraordinary nature." However, the Supreme Court has admonished that the facts of a particular case should not be a basis for appellate jurisdiction:

> The Court of Appeals' . . . rationale—that it was the "extraordinary nature" of [appellant's] claim that merited interlocutory appeal, even though not all [such] claims would be so meritorious—is also unpersuasive. "Appeal cannot depend on the facts of a particular case." *Carroll v. United States,* 354 U. S. 394, 405 (1957). The factual circumstances that underlie a [particular] claim, however "extraordinary," cannot establish its independent appealability prior to trial.

United States v. MacDonald, supra, 435 U. S. at 857-58 n. 6. In my opinion, appellant's claim is essentially an interlocutory appeal over which we lack appellate jurisdiction.

II. Mandamus Jurisdiction

However, I think the extraordinary nature of this case does mandate treatment of the appeal as a petition for writ of mandamus. *E.g., Wilkins v. Erickson,* 484 F. 2d 969 (8th Cir. 1973). *See also Iowa Beef Processors, Inc. v. Bagley,* 601 F. 2d 949, 953 n. 3 (8th Cir. 1979);

Hartland v. Alaska Airlines, 544 F. 2d 992, 1001 (9th Cir. 1976); *id.* at 1003-04 & n. 2 (Wallace, J., concurring) (cases cited therein).

This case reaches us in an extraordinary posture factually as well as legally. The facts indicate the grave nature of appellant's predicament. The prosecution does not dispute appellant's position that he was a secret police informer who provided key evidence in several major criminal trials which resulted in convictions; the law enforcement authorities have in the past kept his informant status secret on some occasions even at the expense of dropping several prosecutions. Some of appellant's former associates have committed violent acts against people. Legally, the issue of a defendant's right to close his trial in these circumstances is one of first impression in this court. Moreover, the district court's decision failed to reconcile the refusal to close at least part of appellant's trial with an abundance of precedent allowing closure to protect prosecution witnesses, including rape victims and police informants, by closing their testimony to the public. (These closure cases are more fully elaborated below in the discussion of the merits.)

Mandamus is the appropriate vehicle for this court to review a decision where "there are present extraordinary and exceptional circumstances which require the grant of the extraordinary remedy to prevent a grave miscarriage of justice which might otherwise result. . . ." *Hartley Pen Co. v. United States District Court,* 287 F. 2d 324, 327 (9th Cir. 1961). *See also Iowa Beef Processors, Inc. v. Bagley, supra,* 601 F. 2d at 953-54; *Gialde v. Time, Inc.,* 480 F. 2d 1295, 1302 (8th Cir. 1973) (Heaney,

J., concurring and dissenting). "It is, of course, well settled, that the writ [of mandamus] is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial. . . . The writ is appropriately issued, however, when there is . . . *a clear abuse of discretion. . . .*" *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964) (emphasis added) (citations omitted). *See also Will v. United States,* 389 U.S. 90, 107 (1967) (Black, J., concurring); *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); 16 WRIGHT, MILLER, COOPER & GRESSMAN, FEDERAL PRACTICE & PROCEDURE, JURISDICTION §§ 3932-3936 (1977).

> [A] number of courts, including this one, have found mandamus to be an appropriate vehicle to review orders compelling . . . testimony claimed to be privileged or covered by other more general interests in secrecy. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F. 2d 596 (8th Cir. 1978) (en banc) (attorney-client privilege); *Usery v. Ritter,* 547 F. 2d 528 (10th Cir. 1977) (disclosure of identity of informer in FLSA case); *Breed v. United States Dist. Ct.,* 542 F. 2d 1114 (9th Cir. 1976) (disclosure of personnel and inmate files of state youth authority); *Pfizer, Inc. v. Lord,* 456 F. 2d 545 (8th Cir. 1972) (attorney-client privilege); *United States v. United States Dist. Co.,* 444 F. 2d 651 (6th Cir. 1971), *aff'd,* 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) (disclosure to conspiracy defendant of his monitored conversations); *Harper & Row Publishers, Inc. v. Decker,* 423 F. 2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348, 91 S. Ct. 479, 27 L. Ed. 2d 433 (1971) (attorney-client privilege); *Hartley Pen Co. v. United States Dist. Ct.,* 287 F. 2d 324 (9th Cir. 1961) (disclosure of secret formula acquired under license forbidding disclosure). . . .

Iowa Beef Processors, Inc. v. Bagley, supra, 601 F. 2d at 953-54.

While the difference between the mandamus approach I suggest and the appellate jurisdiction asserted in Judge Gibson's opinion may seem purely formal at first glance, I believe there are important reasons for making the distinction. First, the majority opinion broadly holds, "Closure would be improper under these circumstances." Slip op. at 13. I do not think we should pretermit due process questions which may be more apparent after trial than now. (I think due process, however, requires at this point that the proceedings be closed in part. *See* part III *infra.*)

Secondly, we should give a more clear indication as to how we will respond to this kind of matter in the future. I agree with Judge Gibson that ordinarily the question of closure is a matter of the trial court's discretion and that it would ordinarily be inappropriate to halt the trial court's proceedings to review the decision. Slip op. at 2-3 n. 2, *citing Gannett Co. v. DePasquale,* — U. S. —, 99 S. Ct. at 2915 (1979) (Powell, J., concurring). But the majority opinion then proceeds to make a special exception in this case and grant review. This treatment may suggest that we would decline to review all such orders in the future. I think that interlocutory review of a closure decision should be available only in extraordinary cases by writ of mandamus. I would apply this rule in this case instead of granting appellate review, since we all seem to agree appellate review should generally be foreclosed at this stage in the proceedings.

III. The Merits

I have reviewed the record, including the transcript of the *in camera* hearing held below, to ascertain the

basis for appellant's closure motion. Appellant testified concerning the dangers he perceived from specific persons if his previous informing activities would be revealed. Although the prosecution thoroughly cross-examined appellant, bringing out factors that might reduce the danger, it did not offer any affirmative evidence to refute appellant's testimony or demonstrate that appellant's apprehension was feigned or unreasonable.

The decision of the court below left Powers with a choice between omitting details of his informing activities from his defense or disclosing publicly information that might well tend to endanger himself and his family.

> The district court held that
>
> an order of closure would not be proper unless the defendant established:
>
> (1) by clear and convincing evidence that there was a clear and present danger of actual harm to the life of the defendant or a member of his family;
>
> (2) consent to the closure on the part of the prosecution, *see Gannett v. DePasquale, supra,* or a compelling reason for not requiring the prosecution's consent;
>
> (3) by clear and convincing evidence that the closure of the defendant's criminal trial would effectively prevent the harm alleged and proven to exist; and
>
> (4) by clear and convincing evidence that there are no effective alternatives to the complete closure of the criminal trial.
>
> The Court concludes that the defendant failed to prove by clear and convincing evidence that the open court presentation of his defense would result in a clear and present danger of actual harm to the

> life of the defendant or a member of his family. The evidence at most demonstrates a fear of harm based on the allegedly violent nature of some of the persons involved. Admittedly, the defendant has shown that the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the defendant. Powers, however, failed to prove that closure would effectively prevent the alleged harm, and provided the Court with no insight on how to prevent the jurors and witnesses from discussing the case subsequent to the trial, or on how to prevent the disclosure of information if the trial court's decision is appealed. In addition, it was brought to the attention of the Court in the closed portion of the hearing that the defendant may generally be known to have been an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation.
>
> Finally, there is an alternative that the Court believes will enable the defendant to present his defense without closing the trial to the public. Such alternative procedure is [a generally-worded stipulation that appellant had in the past been an informant]. Therefore, the defendant's Motion to Exclude the Public During Trial shall be denied because the defendant has failed to establish the necessary circumstances set forth above.

United States v. Powers, 477 F. Supp. 497, 498-99 (S. D. Iowa 1979). In my view, both the standard and the result embody an unduly restrictive approach to the court's power to guarantee Powers a fair trial.

In my analysis, this case involves the most fundamental aspects of due process. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U. S. 284, 294

(1973). In the landmark case of *United States v. Nixon,* 418 U.S. 683 (1974), the court held that due process rights of criminal defendants to obtain evidence needed for their defense outweighs other constitutionally based interests such as a presidential claim that certain communications were privileged. "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." *Id.* at 709. "The right to the production of all evidence at a criminal trial . . . has constitutional dimensions." *Id.* at 711. Although the *Nixon* case directly involved the ability of criminal defendants to obtain evidence for their defense, the rationale applies equally strongly to the ability of defendants to present evidence in their defense at trial. Thus, we have said, "[t]he exclusion of critical evidence under state evidentiary rules may deprive a defendant of a fair trial and amount to a denial of due process," *Johnson v. Brewer,* 521 F. 2d 556, 562 n. 16 (8th Cir. 1975).

Powers claims that publications of his testimony would endanger his life. Therefore, publicity would deter him from putting on evidence of past informing activities much of which is obviously relevant to his defense that he may have committed the acts charged as crimes in the capacity of an informer and lacked criminal intent. The trial court seems to have recognized that, indeed, public proceedings would tend to inhibit appellant from revealing his full activities as an informant, and suggested that appellant rely on a general stipulation as to his status as an informant without going into specifics.

Our tradition of public trials is supported by strong social interests, as Judge Gibson points out. Slip op. at 9-10, *citing Estes v. Texas,* 381 U.S. 532, 583 (1965)

(Warren, C. J., concurring). *See also In re Oliver,* 333 U. S. 257 (1948); Radin, The Right to a Public Trial, 6 TEMP. L. Q. 381 (1932); Note, 36 ORE. L. REV. 345 (1957); 6 J. WIGMORE, EVIDENCE §§ 1834-36 (Chadbourn rev. ed. 1976). But in this case we measure that tradition and the reasons for the tradition against the constitutional guarantee of due process to the defendant. To do so requires, I believe, a look at the considerations which continue to breathe life into the requirement of public trials.

Commentators have pointed out three different kinds of interests protected by keeping trials open. Primary among these general factors supporting open trials is the aid given to the search for truth by the public presence. "This open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1768) (footnote omitted).

> The publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony; it would be essentially desirable and demandable on additional grounds. Nevertheless, it plays an important part as a security for testimonial trustworthiness and would exist as an independent requirement for that reason only, even were other grounds wanting. . . .
>
> . . . Its operation in tending to *improve the quality of testimony* is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public

> opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.

6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn rev. ed. 1976) (emphasis in original). *See also In re Oliver, supra,* 333 U. S. at 270 n. 25.

In this case, the fact that a public trial would inhibit truthful testimony undercuts the rationale that public trials encourage truthful testimony. In this regard this case stands on an entirely different footing than the pretrial publicity cases, such as *Gannett Co. v. DePasquale, supra,* 99 S. Ct. 2898, where nothing suggests that publicity would inhibit truthful testimony. In pretrial publicity cases it is necessary to weigh bias resulting from the publicity against the encouragement of truthful testimony by open proceedings. *See also Nebraska Press Ass'n v. Stuart,* 427 U. S. 539 (1976). By contrast, Powers's claim makes it necessary to evaluate whether the rationale that public proceedings encourage truthful testimony applies in this case at all.

Likewise, Powers's claim places in a different light the potential for members of the public to come forward either in aid of the defendant's case or with information reflecting upon the testimony. The government concedes that Powers has been an informant against some offenders who may well have substantial propensity for violence.

The potential for such witnesses to appear therefore may have a *deterrent* effect on truthful testimony. In a pretrial publicity case no comparable deterrence would normally occur, no matter how prejudicial the publicity.

Pretrial publicity is indeed the norm. There is nothing so inherently dangerous about pretrial publicity that would support an inference of prejudice absent a showing of likelihood the publicity would have a prejudicial effect. But the disclosure of informing activities is not the norm. The danger of such disclosure is evident and may be inferred by the court from the fact of previous informing activities, especially involving serious crimes that may involve violence or subject participants to long prison sentences. The classic example is the case of undercover narcotics agent or informant. *See, e. g., United States ex rel. Lloyd v. Vincent,* 520 F. 2d 1272 (2d Cir.), *cert. denied,* 423 U. S. 937 (1975).

On the basis of Powers's *in camera* testimony, it seems inescapable to me that the man would be deterred from testifying about activities as an informant. The trial court made no finding that satisfies me the danger is not really great enough in this case to have a deterrent effect. The court noted evidence that Powers may be generally known as an informant. To me a general reputation as an informant is one thing; definite public knowledge that Powers informed on a particular person and contributed to a particular punishment is quite another thing. General reputation seems to me much less likely than a report of times and places of actual informing activities to induce violence in revenge. Moreover, Powers's general reputation for informing may well make disclosure more, not less, dangerous to him, for this reputation would surely

prompt Powers's former associates to keep an eye on reports of his trial. *Cf. Pechter v. Lyons,* 441 F. Supp. 115 (S. D. N. Y. 1977) (refusal to close deportation hearing of alleged war criminal).

I think that Powers has shown that requiring him to testify in public to his informing activities would inhibit rather than further the search for truth in this case. That basis for the open trial tradition therefore does not apply to the testimony concerning his informing activities. The court made no finding that would support a contrary conclusion, but instead concluded only that Powers had not adequately shown danger of actual harm. In doing so, the court applied a "clear and present danger" test and placed the burden on Powers to demonstrate the danger by clear and convincing evidence. (The trial court apparently adopted the "clear and present danger" test upon Powers's urging; however, he did not ask for the burden of persuasion to be placed upon him.) The "clear and present danger" test was developed to determine when speech becomes so inseparably integrated with action it falls within the government's power to regulate; thus, that test shows what speech is protected, and only indirectly what government action is prohibited. *See, e. g., Gitlow v. New York,* 268 U. S. 652, 672 (1925) (Holmes, J., dissenting). I think a much more apt analogy for the infringement of appellant's due process rights is the chilling effect test which determines when government action deters the exercise of fundamental rights. *E. g., National Ass'n for the Advancement of Colored People v. Alabama,* 357 U. S. 449 (1958). Undisputed testimony that a defendant has been an informant and that some of his associates at the time were prone to violence is enough to demonstrate to

me that the defendant would reasonably be deterred from putting on evidence about informing activities.

I do not suggest that the rationale for public trials disappears any time a party claims that public proceedings will inhibit testimony. As the majority points out, a defendant does not have a right to waive a public trial regardless of circumstances. *See* slip op. at 6 & n. 4, *citing Singer v. United States*, 380 U. S. 24, 35 (1965). Thus, a defendant must make an evidentiary showing of something which has a reasonable tendency to inhibit truthful testimony. There must also be special circumstances to suggest that closure would not increase the likelihood of untruthful testimony; in this case the prosecution concedes that Powers previously did act as an informant. Moreover, if the effort to close any part of a trial is opposed, I think the testimony in question must be so critical to the case of the party seeking closure that the inhibitive effect of non-closure would result in denial of some fundamental right, in this case Powers's due process rights in presenting evidence critical to his defense.

The trial court may have considered the proposed general stipulation of informing status adequate to give Powers's due process in this case, but I cannot agree. The particular details of Powers's previous activities undoubtedly would color the jury's impression of the activities for which he is now prosecuted. A stipulation lacks the pungency of live testimony. Therefore the general rule is that a party may refuse to stipulate and offer proof on a point admitted. "The reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked ad-

mission might have the effect to rob the evidence of much of its fair and legitimate weight.'" *United States v. Peltier,* 585 F. 2d 314, 324 (8th Cir. 1978), *cert. denied,* 440 U. S. 945 (1979), *citing Parr v. United States,* 255 F. 2d 86, 88 (5th Cir.), *cert. denied,* 358 U. S. 824 (1958). *See also United States v. Brickey,* 426 F. 2d 680, 686 (8th Cir.), *cert. denied,* 400 U. S. 828 (1970); 9 J. WIGMORE, EVIDENCE § 2591 & n. 2 (3d ed. 1940). Where the proposed stipulation involves evidence critical to the defense of a criminal accused, this rule takes on significant due process implications.

A second general consideration supporting public trials is the effect on trial conduct. Public scrutiny tends to discourage arbitrariness and improprieties of court proceedings and to impress upon the judge, jury and other officers of the court the importance and seriousness of their task. "The right of a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant." *Lewis v. Peyton,* 352 F. 2d 791, 792 (4th Cir. 1965). While the potential disclosure of Powers's informant activities would tend to discourage truthful testimony by him about informing, disclosure would not tend to undermine this second rationale for open trials.

But this general consideration does not negate the due process concerns that favor giving Powers every fair opportunity to present testimony about informing activities in his defense, and it is evident that the two considerations can be accommodated. The closure of only those parts of the trial where Powers's testimony is taken re-

lieves him of whatever danger would tend to discourage him from testifying. The remainder of the trial—voir dire, witnesses not testifying on the informant issue, and other proceedings that would not directly endanger Powers because of his testimony—should remain fully open to the public. Although Powers may be concerned that, for example, jurors or others necessarily witnessing the proceedings might after trial reveal the specifics of his informing activities, the trial court could minimize the danger by admonishing them to secrecy on this matter. *Cf. United States v. Sherman,* 581 F. 2d 1358 (9th Cir. 1978). The trial court's converse concern that secrecy could not be preserved in an appeal presents no real problem, as the portions of the record relating to Powers's informant activities could be treated exactly the way his *in camera* testimony has been treated on this appeal. Therefore, while the need for public scrutiny of court proceedings forecloses any attempt to close the entire trial in this case, closure of only the testimony concerning Powers's informing activities allows public scrutiny while accommodating the due process considerations in allowing Powers a full opportunity to put on his defense. *See United States ex rel. Latimore v. Sielaff,* 561 F. 2d 691 (7th Cir. 1977), *cert. denied,* 434 U. S. 1076 (1978); *Doe v. Risher,* 2 MEDIA L. REP. (BNA) 1300 (D. C. Sup. Ct. 1976).

Finally, the public has an interest not only in fair procedures but in knowing the substance of legal controversies. Persons who think themselves affected by the outcome or proceedings in a case have an interest in attending or reading reports of the trial. Criminal proceedings may have a deterrent effect on those contemplating crime or on abuses by police or other official powers.

The public needs to know how its laws work or democracy might easily be reduced to a formality. All of these interests support keeping trials open generally. *See Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469, 491-93 (1975).

In this case there even may be a particularly strong public interest in observing the proceedings. (Indeed, at least one newspaper opposed any closure below, although it does not pursue its interest in this court.) The fact that the defendant has been an informer for law enforcement agencies suggests to me that the public might have especial concern in the degree of police cooperation with criminal elements. On this record there does not appear to be any impropriety, but closed trials of informants might generally suggest to the public or press a potential for a whitewash of some unsavory dealings or conversely for a vendetta by the authorities to dispose of some shady involvement on the fringe or outside of the law. The public certainly has an interest in knowing more about the whole business.

I do not minimize the public's right to pursue such matters which I think have constitutional dimensions under the First Amendment guarantee of freedom of the press. *See generally Smith v. Daily Mail Publishing Co.,* — U. S. —, 99 S. Ct. 2667 (1979); *Landmark Communications, Inc. v. Virginia,* 435 U. S. 829 (1978). But Powers is entitled to a fair trial, and the press must find its sources elsewhere if its presence at the trial would deny the defendant due process. *Gannett Co. v. DePasquale, supra,* 99 S. Ct. at 2904; *id.* at 2915 (Powell, J., concurring); *id.* at 2936 (Blackmun, J., dissenting); *Sheppard v. Maxwell, supra,* 384 U. S. 333; *Estes v. Texas, supra,* 381 U. S. 532.

The result I would reach, that particular testimony by Powers or others concerning the specifics of his past informing activities may be closed to the public, is not at all unprecedented. Limited closure by trial courts of specific proceedings has been upheld where appropriate not only to protect the defendant's due process rights but also on the motion of the prosecution over the defendant's objection, where the court has found compelling reason to do so. In particular there is a line of cases in which trials have been closed to protect the identities of police informants while they testify at trial. *E.g., United States ex rel. Lloyd v. Vincent, supra,* 520 F. 2d 1272; *People v. Hinton,* 31 N.Y. 2d 71, 334 N.Y.S. 2d 885, 286 N.E. 2d 265 (1972), *cert. denied,* 410 U.S. 911 (1973). I do not say that these cases satisfy me that a trial can be closed over the defendant's objection without violating the Sixth Amendment's clear language affording the defendant a right to a public trial. But the cases closing informant's testimony on the prosecution's motion certainly indicate that the interests of a party or a witness in this kind of case may require closure in the absence of a specific statutory or constitutional provision prohibiting closure.

Notably, in at least one of the informant cases, the court closed the testimony on the mere showing that the witness had been an informant. *United States ex rel. Lloyd v. Vincent, supra,* 520 F. 2d at 1275. Other cases of closure over the defendant's objection include: *Stamicarbon, N.V. v. American Cyanamid Co.,* 506 F. 2d 532 (2d Cir. 1974) (closure of criminal contempt hearing to protect trade secrets); *United States v. Bell,* 464 F. 2d 667 (2d Cir.), *cert. denied,* 409 U.S. 991 (1972) (court

cleared during pretrial proceedings to protect the secrecy of the government's "skyjacker" profile which was the subject of testimony); *United States ex rel. Bruno v. Herold,* 408 F. 2d 125 (2d Cir. (1969), *cert. denied,* 397 U.S. 957 (1970) (court cleared for one day of all spectators to protect prosecution witness from intimidation); *Harris v. Stephens,* 361 F. 2d 888 (8th Cir. 1966), *cert. denied,* 386 U.S. 964 (1967) (closure to protect rape victim from public scrutiny during her testimony concerning the crime); *Reagan v. United States,* 202 F. 488 (9th Cir. 1913) (*simil*); *United States ex rel. Smallwood v. LaValle,* 377 F. Supp. 1148, *aff'd,* 508 F. 2d 837 (2d Cir. 1974), *cert. denied,* 421 U.S. 920 (1975) (closure during testimony of prosecution witness to avoid intimidation); *Hogan v. State,* 191 Ark. 437, 86 S.W. 2d 931 (Ark. 1935) (closure during testimony of rape victim); *Lowe v. State,* 141 Ga. App. 433, 233 S.E. 2d 807 (1977) (closure during testimony of rape victim); *People v. Hagan,* 24 N.Y. 2d 395, 300 N.Y.S. 2d 835, 248 N.E. 2d 588, *cert. denied,* 396 U.S. 886 (1969) (closure to prevent intimidation of witness to assassination of Malcolm X). Although enumerating cases does not of course demonstrate their correctness, the above cases indicate that at least partial closure of a trial has been considered within the discretion of trial courts.

Iu at least two cases comparable to this one some closure has been permitted on the defendant's motion. In *Kirstowsky v. Superior Court,* 143 Cal. App. 2d 745, 300 P. 2d 163 (1956), the defendant, accused of murdering her husband, sought to defend by presenting evidence that her husband had forced her to commit repugnant sexual acts. The trial court found that she was phychically unable to testify in public about the sexual acts

and ordered the trial closed. In *State v. Poindexter,* 231 La. 630, 92 So. 2d 390 (1956), the Louisiana Supreme Court held it reversible error for the trial court to refuse to exclude spectators whose presence would intimidate a defense witness. *Cf. United States v. Rios Ruiz,* 579 F. 2d 670, 674-75 (1st Cir. 1978). *See also Commonwealth v. Principatti,* 260 Pa. 587, 104 A. 53, 57-58 (1918). *But see State v. Velasquez,* 76 N. M. 49, 412 P. 2d 4, *cert. denied,* 385 U. S. 867 (1966).

I do not mean to indicate that courts have been undivided on the difficult issues touched on by this case: under what circumstances and to what extent a trial may be closed in derrogation of our tradition of public trials. On the contrary, a considerable diversity of opinion exists. *See, e.g., United States v. Cianfrani,* 573 F. 2d 835 (3d Cir. 1978); *United States ex rel. Laws v. Yeager,* 448 F. 2d 74 (3d Cir. 1971), *cert. denied,* 405 U. S. 976 (1972); *United States v. Kobli,* 172 F. 2d 919 (3d Cir. 1949); *Tanksley v. United States,* 145 F. 2d 58 (9th Cir. 1944); *Davis v. United States,* 247 F. 394 (8th Cir. 1917); *Commercial Printing Co. v. Lee,* 262 Ark. 87, 553 S. W. 2d 270 (1977); *State v. Schmit,* 273 Minn. 78, 139 N. W. 2d 800 (1966); *People v. Jelke,* 308 N. Y. 56, 123 N. E. 2d 769 (1954); *E. W. Scripps Co. v. Fulton,* 100 Ohio App. 157, 125 N. E. 2d 896, *dismissed,* 164 Ohio St. 261, 130 N. E. 2d 701 (1955). *See generally* Annot., 39 A. L. R. 3d 852 (1971); Annot., 4 L. Ed. 2d 2128 (1960); Annot., 48 A. L. R. 2d 1436 (1956); Annot., 156 A. L. R. 265 (1945); J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, TRIAL RIGHTS §§ 100-103 (1974); Note, 91 HARV. L. REV. 1899 (1978); Note, 1966 WASH. U. L. Q. 458; Comment, 52 MICH. L. REV. 128 (1953).

In this case, we are presented with, in my opinion, a relatively narrow issue of the need to close a trial to allow a defendant to put on the kind of informant defense which Powers seeks to present to the jury. In my view, this case presents a very different issue than would a case of closure to prevent pretrial publicity. In my opinion, different questions would be presented if the government had evidence to controvert Powers's assertion that he was an informant, or if Powers's claim were that he was afraid to testify that someone else had committed the crime with which he was charged. Such claims may well exemplify the kind of proceeding in which publicity serves an essential function of encouraging truthful testimony. In this case, however, the trial court expressly found that "the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the defendant." As discussed above, I think that Powers has made sufficient showing that closure of certain testimony is required if his trial is to be a "search for truth." The stipulation proposed by the trial court is clearly inadequate to present his case effectively to the jury. Therefore, I conclude that Powers's right to due process compels closure of testimony by Powers or by others about Powers's informing activities. I would not, however, close proceedings other than testimony on these informing activities.

I would therefore treat this appeal as a petition for writ of mandamus and grant the petition.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix B

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES CODE SERVICE, TITLE 18

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)

UNITED STATES CODE SERVICE, TITLE 18

§ 474. *Plates or stones for counterfeiting obligations or securities*

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with

any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made

after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner bakes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 706.)

Appendix C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Criminal No. 79-26

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARK RICHARD POWERS,

Defendant.

RULING AND ORDER

(Filed September 7, 1979)

The Court has before it the defendant's Motion to Exclude the Public During Trial filed July 25, 1979. The United States responded in a resistance filed August 6, 1979, and pursuant to the Order of this Court, the Des Moines Register and Tribune Company filed an amicus curiae brief on August 17, 1979. A hearing on the defendant's motion was held on August 29, 1979 and continued to September 4, 1979. In open court, the defendant, the plaintiff and the amicus curiae presented argument on the issue of whether the Court as a matter of law has the power to order complete closure of the criminal trial upon the defendant's request. Following these presentations, the Court closed the remainder of the hearing to the public, including the Des Moines Register and Tribune Company, and heard argument from the parties concern-

ing the factual basis of the defendant's allegations that the presentation of his defense in open court would endanger his and his family members' lives.

The defendant contends that if the entire trial is not closed as requested he will not be able to adequately present his defense to the United States' charges because of the dangers mentioned above, and thereby will be denied his constitutional right to a fair trial. The United States resists this contention by arguing that the Court must consider three factors in evaluating the defendant's evidence in support of closure. Those factors are a demonstrated necessity for closure, a lack of viable alternatives to closure, and the effectiveness of closure in preventing the alleged harm. The Des Moines Register and Tribune Company challenged the defendant's contention by arguing that closure of a criminal trial is not a right vested in a criminal defendant, and that closure violates the First Amendment guarantee of the freedom of the press. In addition, the amicus curiae contended that the public has a strong interest in open criminal trials that is supported by a traditional distrust of secret trials in this country. The matter before the Court, therefore, focuses on the interface of the defendant's constitutional right to a fair rial and the public's demand for an open trial, whether guaranteed by the Constitution or by the time-honored traditions of the American Judiciary.

Counsel for both parties, as well as the amicus curiae, failed to present any instance where a secret criminal trial was held in an American court of law. However, the Court is not willing to say it has no power to order closure of a criminal trial. Situations might arise where the defendant by clear and convincing evidence could establish

exceptional facts and circumstances that effectively prevent the defendant from presenting his defenses and thereby deny him a fair trial. See Gannett Publishing Co. v. DePasquale, — U. S. —, 99 S. Ct. 2898, 2915 (July 2, 1979) (Powell, J., concurring).[1] The Court, after closely scrutinizing the evidence presented in the closed hearing and carefully weighing the fundamental interests of the parties as well as the public, concludes that the defendant has failed to sustain that burden of proof.

In the Court's opinion, an order of closure would not be proper unless the defendant established:

(1) by clear and convincing evidence that there was a clear and present danger of actual harm to the life of the defendant or a member of his family;

(2) consent to the closure on the part of the prosecution, See Gannett v. DePasquale, supra, or a compelling reason for not requiring the prosecution's consent;

(3) by clear and convincing evidence that the closure of the defendant's criminal trial would effectively prevent the harm alleged and proven to exist; and

(4) by clear and convincing evidence that there are no effective alternatives to the complete closure of the criminal trial.

The Court concludes that the defendant failed to prove by clear and convincing evidence that the open

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[1]In Gannett, the Supreme Court upheld a trial judge's order requiring closure of a pretrial hearing in a case where the participants in the litigation agreed that closure was necessary to protect the defendant's right to a fair trial. The Court believes that Gannett is not directly applicable here because the facts of the present case show that the prosecution did not consent to the defendant's closure request, and that the defendant is requesting closure of his complete criminal trial, not just a pretrial hearing as in Gannett.

court presentation of his defense would result in a clear and present danger of actual harm to the life of the defendant or a member of his family. The evidence at most demostrates a fear of harm based on the allegedly violent nature of some of the persons involved. Admittedly, the defendant has shown that the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the defendant. Powers, however, failed to prove that closure would effectively prevent the alleged harm, and provided the Court with no insight on how to prevent the jurors and witnesses from discussing the case subsequent to the trial, or on how to prevent the disclosure of information if the trial court's decision is appealed. In addition, it was brought to the attention of the Cour in the closed portion of the hearing that the defendant may generally be known to have been an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation.

Finally, there is an alternative that the Court believes will enable the defendant to present his defense without closing the trial to the public. Such alternative procedure is hereinafter set forth. Therefore, the defendant's Motion to Exclude the Public During Trial shall be denied because the defendant has failed to establish the necessary circumstances set forth above.

In the closed hearing, the defendant testified as to several specific instances in which he had supplied information to the government. His testimony in this regard was not disputed by the government and can be summarized as follows:

(1) the defendant on six (6) occasions participated in a conspiracy pursuant to his duties as an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation, and in so doing, the defendant possessed contraband for a period of time when law enforcement personnel were aware of the defendant's possession of the contraband;

(2) the defendant on two (2) occasions participated in a conspiracy pursuant to his duties as an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation, and in so doing, the defendant possessed contraband for a period of time when law enforcement personnel were not aware of the defendant's possession of the contraband;

(3) the defendant on three (3) occasions participated in a conspiracy pursuant to his duties as an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation, and in so doing, the defendant at no time possessed contraband.

If the government and defendant can stipulate on this or similar language, the Court will permit it to be introduced into evidence. If the parties cannot so stipulate, the Court will permit the defendant to read such summary to the jury as the Court's finding of facts in the closed hearing. If this alternative is not satisfactory to the defendant, he may testify about the specific instances in open court and be subject to cross-examination or refrain from raising this matter as a defense.

IT IS THEREFORE ORDERED that the defendant's Motion to Exclude the Public During Trial shall be denied.

IT IS FURTHER ORDERED that the defendant shall be allowed to testify fully in open court as to his defense, and if the defendant chooses not to do so, as an alternative, the defendant shall be allowed to present as evidence of his defense the summary set forth in this Order.

Signed this 7 day of September, 1979.

/s/ W. C. Stuart, Chief Judge
Southern District of Iowa

Appendix D

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. .....

MARK RICHARD POWERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, John P. Roehrick, Attorney for the Petitioner, hereby certify that on this 27 day of May, 1980, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to:

ROXANNE CONLIN
U. S. District Attorney
Southern District of Iowa
Federal Courthouse
East 1st & Walnut
Des Moines, Iowa 50309

I further certify that all other parties required to be served have been served.

JOHN P. ROEHRICK
ROEHRICK, LAVORATO, SCHUSTER,
SULLINS & HASSEL
535 Insurance Exchange Building
Des Moines, Iowa 50309
Attorneys for Petitioner

Appendix E

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

MARK RICHARD POWERS,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEARANCE

COMES NOW John P. Roehrick, Roehrick, Lavorato, Schuster, Sullins & Hassel, 535 Insurance Exchange Building, Des Moines, Iowa, 50309, and hereby enters his appearance on behalf of Mark Richard Powers, Petitioner, in the above cause.

Respectfully submitted,

JOHN P. ROEHRICK
ROEHRICK, LAVORATO, SCHUSTER,
SULLINS & HASSEL

535 Insurance Exchange Building
Des Moines, Iowa 50309